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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35057

MOTION FOR PROTECTIVE ORDER

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*Attorneys for Respondent
Coastal Recycling, LLC*

August 8, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35057

MOTION FOR PROTECTIVE ORDER

Respondents New York and Atlantic Railway Company and Coastal Distribution, LLC request the Board enter a Protective Order relieving them from any obligation to respond to Petitioners' requests for production of document and deposition testimony.

Procedural Status

Petitioners filed their petition for declaratory order on July 5, 2007 and attached a voluminous Request to Produce Documents to the copy of the petition served on Respondents. Respondents filed their response on July 25, 2007 together with a copy of the Appendix prepared and filed by the Petitioners in their unsuccessful appeal to the Second Circuit Court of Appeals of a preliminary injunction against enforcement of the Town's zoning ordinance; Respondent's response argued that no further discovery was necessary in this matter.

On August 3, 2007, Petitioners served a Notice of Deposition on Respondents and a demand that if documents were not immediately produced, Petitioners would seek an enforcement order from this Board. A copy of Petitioners' Request to Produce Documents is attached hereto as Exhibit 1; a copy of Petitioners' Notice of Depositions is attached as Exhibit 2; Petitioners' demand for discovery is attached as Exhibit 3.

This Board has not yet opened a proceeding in this docket.

Substantive Issues Involved

Petitioners seek a declaratory order finding that enforcement of the Town's zoning ordinance is not preempted because Coastal Distribution, LLC ("Coastal") is operating the bulk materials transload facility in question, and Coastal is not an agent of New York and Atlantic Railway Company ("NY&A"). NY&A contends that Coastal is its contract agent to operate the terminal, and that NY&A is not required to utilize its own employees to operate the facility to enjoy the protection from local zoning ordinances provided by Congress in ICCTA. This dispute presents a purely legal issue of whether an unquestioned rail common carrier can delegate operation of a transload facility to a contract operator without forfeiting the umbrella of federal preemption of local land use regulation.

ARGUMENT

I. No Additional Discovery Is Necessary

Respondents provided to this Board a copy of the very Appendix prepared and filed by Petitioners in their appeal to the Second Circuit in this case, *Coastal Distribution, LLC and New York and Atlantic Railway Company v. Town of Babylon, et al.*, Second Circuit No. 06-0981, 216 Fed. Appx. 97 (Feb.6, 2007). The record in this case was compiled over two days of testimony in federal court, and includes two other days of hearings before the Board of Zoning Appeals of the Town of Babylon. In the District Court, the President of NY&A testified and was cross-examined by counsel for both Petitioners. The Managing Member of Coastal testified and was cross-examined by counsel for both Petitioners. Voluminous documents concerning the relationship between NY&A and Coastal were introduced into evidence, including the documents reflecting the history of NY&A's use of the Farmingdale Yard and its relationship with Coastal. Petitioners had ample opportunity to introduce evidence and they took that

opportunity – including videotapes of several days of operation at the facility recorded by their own investigator. There is no mystery about what happens at the Farmingdale terminal or what the relationship is between the railroad and Coastal.

The only material issue before this Board is whether NY&A, by and through its contract operator Coastal, holds itself out to the public to provide bulk material transload service at Farmingdale. It is undisputed that NY&A has in fact designated Coastal as its contract-operator. It is undisputed that NY&A/Coastal in fact hold the Farmingdale facility out to the public for rail transportation service. How much money NY&A makes doing so, how much money Coastal makes, who paid how much for construction of the building, how often NY&A inspects the building and all the other details and mechanics of the business relationship between Coastal and NY&A are beside the point.

Petitioners' letter, Exhibit C hereto, asserts that they seek not merely economic information but also, "documents concerning the safety of the Farmingdale Facility, the true nature of the relationship between NY&A and Coastal, and the types of materials handled at the Farmingdale Facility." Page 2. None of those subjects are relevant to the question of whether NY&A and Coastal hold the Farmingdale Facility out to the public for railroad transload service. None of those subjects is likely to lead to the discovery of admissible evidence with regard to whether NY&A and Coastal hold the Farmingdale Facility out to the public for railroad transload service. Petitioners themselves quote the following from this Board's recent decision in *Tri-State Brick and Stone of New York, Inc.*, STB Finance Doc. 34824, at p.4 (STB served Aug. 9, 2006):

Further, there is no evidence that CP or NY&A has ever quoted rates or charged compensation for Tri-State Transportation's transloading service or held out that service as part of the line haul rail transportation offered by either railroad.

The precise opposite is the situation in this case. Here it is undisputed that NY&A has held out the Farmingdale terminal to the shipping public as a bulk material transfer facility as part of the line haul transportation service offered by NY&A and by its connecting line haul Class I carriers. None of Petitioners' 52 document requests are directed at that issue. Petitioners' attempted line of inquiry may be relevant to substantive issues within the Board's jurisdiction, but it is not relevant to the issue here, *i.e.*, whether this Board's jurisdiction preempts Babylon's zoning ordinance.

II. Petitioners Discovery Requests Are Abusive

Petitioners' 10-page document request itemizes 52 separate categories of documents that cover every conceivable aspect of the history, operation, finances, and commercial terms of the Farmingdale transload terminal. Responding to that request would entail hours of examining paper and computer files at both NY&A and Coastal and would produce mountains of useless paper. The request is simply a fishing expedition to annoy and harass the Respondents.

Likewise, the deposition notice calls for depositions from the President of NY&A and from each of the Members of Coastal. There is no reason to think that depositions from these three individuals will yield any more useful information than did the testimony (including cross-examination) of two of the three individuals in federal court.

The timing and circumstances of these requests belie their sincerity. Petitioners could have sought discovery at any time while this dispute was before the Eastern District of New York. The complaint was filed on April 25, 2005, and the notices of appeal were filed on February 27 and 28, 2006. The Second Circuit's decision was issued on February 6, 2007 and the formal mandate arrived in the district court on March 7, 2007. This Petition was filed with the Board four months later on July 5, 2007. Despite the 14 months that this dispute was

pending in the district court, Petitioners never sought any discovery. Only after NYA and Coastal initiated the procedures to seek summary judgment did Petitioners decide to bring this matter to the Board and for the first time seek any discovery whatsoever. The only explanation for such behavior is that either the information is not really necessary for Petitioner's case, or the Petitioner's think this Board will be more permissive with discovery than the district court

III. Board Procedures and Precedent Favor Issuing a Protective Order

Petitioners' request for discovery is premature because this Board has not yet even determined to open a proceeding. The Board's discovery rules apply to "proceedings," and until the Office of Proceedings opens a proceeding, there is no basis for discovery at all. See 49 C.F.R. §1011.7(b)(5). This Board may decide not to open any proceeding in this matter. See, e.g., *National Solid Wastes Management Ass'n, et al.—Petition for Declaratory Order*, STB Finance Doc. No. 34776 (STB served March 10, 2006).

Assuming that the Board will open a proceeding in this matter, Petitioner's discovery requests are unnecessary and burdensome. There are no disputed factual issues in this case. This Board has ruled previously that where the Board is not called upon to make factual findings, neither discovery nor evidentiary proceedings are necessary. *CSX Transportation, Inc —Petition for Declaratory Order*, Finance Docket No. 34662, slip op. at 6 (STB served March 14, 2005), citing *Consolidated Rail Corp.—Declaratory Order Proceeding*, STB Docket 34319, slip op. at 7 (STB served Oct. 10, 2003). Further, the Board will bar depositions where they serve no purpose, *Kaw River Railroad, Inc.—Acquisition and Operation Exemption—The Kansas City Southern Railway Company*, Finance Docket No. 34509, slip op. 2-3 (STB served May 3, 2005).

Respondents voluntarily placed in evidence years ago the documents concerning NYA's historical use of the Farmingdale Yard, all the contracts between NYA and its operators at

Farmingdale, NYA's website describing the Farmingdale transload facility and its tariffs for movements from that facility, and other relevant materials. The Respondents produced their officers for testimony and cross-examination. Perhaps assuming that this Board would be more lenient than the district court, Respondents for the first time now demand wall-to-wall discovery of the Farmingdale facility. When this Board adopted streamlined discovery rules that eliminated the ICC's requirement to seek a prior discovery order, the Board noted that discovery could be abused for harassment. The Board indicated that it stood ready to intervene when necessary. *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, Ex Parte No. 527, 1 STB 754, 766 (1996). The Board's intervention is necessary in this case. Petitioners' requested discovery would result in "annoyance, ... oppression or undue burden or expense," and in "the raising of issues untimely or inappropriate to the proceeding." 49 C.F.R. §1114.21(c).

CONCLUSION

Respondents New York and Atlantic Railway Company and Coastal Distribution, LLC request this Board issue a protective order pursuant to 49 C.F.R. §1114.21(c)(1) relieving Respondents of any obligation to respond to Petitioners' request to produce documents or their notice of deposition.

Dated: August 8, 2007

Respectfully submitted,

By: /s/Ronald A. Lane

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*Attorneys for Respondent
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By: /s/John F. McHugh

6 Water Street

New York, NY 10006

(212) 483-0875 Telephone

Attorneys for Respondent

Coastal Recycling, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 8TH day of August, 2007, I have caused to be filed with the Surface Transportation Board the foregoing **Motion for Protective Order** and have served a true and correct copy thereof upon the following parties:

Mark A. Cuthbertson, Esq.
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, NY 11743
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Attorney for Pinelawn Cemetery

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Attorney for Pinelawn Cemetery

Howard M. Miller, Esq
Bond, Schoeneck & King, PLLC
1399 Franklin Avenue
Garden City, NY 11530
(516) 267-6301 Facsimile
Attorneys for Town of Babylon

via facsimile transmission.

/s/Ronald A. Lane

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35057

REQUEST OF PETITIONERS THE TOWN OF BABYLON AND PINELAWN
CEMETERY FOR THE PRODUCTION OF DOCUMENTS BY NEW YORK
AND ATLANTIC RAILWAY COMPANY AND COASTAL DISTRIBUTION LLC

Pursuant to 49 C.F.R. § 1114.30, the Town of Babylon and Pinelawn Cemetery Corporation (together referred to as "Petitioners") hereby request that New York and Atlantic Railway Company and Coastal Distribution LLC produce and permit Petitioners to inspect and copy the documents described below. The production should be made on or before thirty days following the date of this Request at the offices of Duane Morris LLP, 1540 Broadway, New York, NY 10036.

Definitions

For purposes of this Request, the following definitions shall apply.

1. Communication. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).
2. Document. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.
3. Identify (with respect to persons). When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that



person need be listed in response to subsequent discovery requesting the identification of that person.

4. Identify (with respect to documents). When referring to documents, "to identify" means to give, to the extent known, the (a) type of document; (b) general subject matter; (c) date of the document; and (d) author(s), addressee(s) and recipient(s).

5. References to Entities. When an entity is referred to, the request includes the entity and, where applicable, its officers, directors, employees, partners, members, corporate parent, subsidiaries, or affiliates.

6. Person. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

7. Concerning. The term "concerning" means relating to, referring to, describing, evidencing, or constituting.

8. All/Each. The terms "all" and "each" shall be construed as all and each.

9. And/Or. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

10. Number. The use of the singular form of any word includes the plural and vice versa.

11. Coastal. "Coastal" refers to Coastal Distribution LLC and includes its members, officers, employees, and other agents or representatives.

12. Facility. "Facility" refers to the yard and transloading facility, as defined in the Transload Facility Operations Agreement, dated as of August 5, 2004.

13. Lease. "Lease" refers to the Lease Agreements dated March 22, 2002 and July 11, 2002, and any amendments thereto, between New York and Atlantic Railway Company and Coastal with respect to the property identified as the Farmingdale Team Yard.

14. LIRR. "LIRR" refers to the Long Island Railroad and includes its officers, agents, and other representatives.

15. MTA. "MTA" refers to the Metropolitan Transportation Authority and includes its officers, agents, and their representatives.

16. NYAR. "NYAR" refers to New York and Atlantic Railway Company and includes its officers, directors, employees, and other agents or representatives.

17. Operations Agreement. "Operations Agreement" means the Transload Facility Operations Agreement dated as of August 5, 2004 between NYAR and Coastal.

18. Pinelawn. "Pinelawn" means Pinelawn Cemetery Corporation and includes its officers, directors, employees, and other agents or representatives.

19. Structure. "Structure" refers to the three-sided structure built at the Facility.

20. Town. "Town" refers to the Town of Babylon and includes its agents or other representatives.

21. Commodities. "Commodities" refers to any type of material received at the Facility for transport to another location.

Instructions

1. All documents produced by defendants in response to this Request shall be produced as they are maintained in the usual course of business or shall be organized and designated so as to correspond to the Request to which the documents are responsive.

2. Where a claim of privilege is asserted in objecting to any item of this Request, the documents should be produced, except that it is not necessary to produce the portion of the document as to which the privilege is claimed. However, where privilege is claimed, defendants shall set forth a) the date, author, and subject matter of the document; b) the name and title of each person who prepared, received, reviewed, or has or had custody, possession, or control of the document; c) the identity and length of any attachments to the document; and d) the nature of the privilege being claimed or the ground for withholding the document.

3. If any responsive document has been, but no longer is, in the possession, custody or control of the party responding to the Request, the document shall be listed by listing all of the following information: a) the date of the document; b) a description of the subject matter of the document; and c) the name or names and addresses of each person who prepared, received, reviewed or otherwise has or had possession, custody, or control of the document.

4. Unless otherwise indicated, all requests call for the production of documents for the period from January 1, 2002 to and including the date of production.

Documents to Be Produced

1. Documents sufficient to establish how Coastal came to be involved in the Facility.
2. Documents concerning or constituting or reflecting the earliest communication between Coastal and NYAR.
3. All documents concerning the Lease, including drafts thereof.
4. All documents concerning the replacement of the Lease with the Operations Agreement.
5. All drafts of the Operations Agreement.

6. All documents concerning the cost of building the Structure at the Facility, including but not limited to architectural and other professional fees, the cost of construction materials, and construction costs.
7. All documents concerning the payment of the cost of constructing the Structure at the Facility.
8. All documents concerning the cost of maintaining and operating the Facility.
9. All documents concerning communications with the LIRR and/or the MTA about Coastal's actual or proposed use of the Facility.
10. All documents provided to the LIRR and/or the MTA about Coastal's proposed use of the Facility.
11. All documents concerning Coastal's business plan for the Facility.
12. All documents concerning NYAR's business plan for the Facility
13. Documents sufficient to establish the oversight of the Facility exercised by NYAR.
14. All documents constituting communications with the Town and/or Pinelawn concerning the Facility.
15. All documents concerning air monitoring, dust levels, or any other environmental testing at the Facility.
16. All documents concerning complaints about the Facility, excluding communications from the Town or Pinelawn.
17. All documents concerning Coastal's ownership of railway cars used at or in the operation of the Facility.

18. All documents concerning Coastal's leasing of railroad cars used at or in the operation of the Facility.

19. All logs or other records concerning (a) deliveries to or removed or shipped from the Facility ; (b) the type of commodities delivered to or removed or shipped from the Facility; and (c) the weight of commodities delivered to or removed or shipped from the Facility.

20. All documents constituting or reflecting contracts between Coastal and Coastal's customers for the shipment of commodities to or from the Facility.

21. All documents concerning payments made by or due from Coastal to NYAR in connection with the Facility.

22. All documents concerning payments made by or due from NYAR to Coastal in connection with the Facility.

23. All documents concerning amounts paid to or due Coastal on account of the shipment of commodities to or from the Facility.

24. For the period commencing March 1, 2002, all documents concerning amounts paid to or due NYAR on account of the shipment of commodities to or from the Facility.

25. All documents concerning or evidencing control by NYAR of Coastal's activities at the Facility.

26. All payroll records relating to Coastal employees working at the Facility.

27. All payroll records relating to NYAR employees working at the Facility.

28. All documents concerning Loading Fees, as defined in the Operations Agreement, including but not limited to documents concerning the setting of the amount of the Loading Fee and the collection of the Loading Fee.

29. All documents concerning the Usage Fee, as defined in the Operations Agreement, paid or due NYAR.
30. All documents concerning or evidencing the "monthly accounting of the rail cars and trucks loaded by Coastal," as referred to in paragraph 2.02 of the Operations Agreement.
31. All documents concerning amounts paid to or due NYAR by customers of Coastal for shipments to or from the Facility.
32. All documents concerning Disposal Agreements, as defined in the Operations Agreement, relating to commodities shipped to or from the Property.
33. All documents concerning fees or charges paid to or due Coastal pursuant to Disposal Agreements, as defined in the Operations Agreement.
34. All documents constituting or reflecting or referring to communications between Coastal and NYAR concerning Coastal's conduct of or activities at the Facility.
35. All documents concerning Coastal's marketing of the Facility, as referred to in paragraph 1.04(d) [sic] of the Operations Agreement.
36. All documents constituting or reflecting or referring to brochures or marketing materials, including but not limited to electronic materials and advertisements in trade publications, with respect to the Facility.
37. All documents concerning instructions or rules provided to customers concerning the delivery of commodities to the Facility, including but not limited to instructions or rules concerning the types of materials that can be delivered to the Facility.
38. All documents concerning written procedures for handling commodities received at the Facility, including but not limited to the handling of asbestos-containing materials or other hazardous materials.

39. All documents concerning payments made or due on account of the recovery or recycling of scrap at the Facility.
40. All documents concerning the removal of scrap from the Facility.
41. All documents concerning agreements with landfills with respect to commodities shipped to or from the Facility.
42. All documents concerning or constituting or evidencing the effect of the Facility on truck traffic.
43. All documents concerning signage at the Facility.
44. All documents concerning or constituting communications between NYAR or Coastal on the one hand, and any federal, state, or local agency (including the Surface Transportation Board, but excluding the Zoning Board of Appeals of the Town of Babylon) concerning the Facility.
45. All communications with the Surface Transportation Board concerning Coastal.
46. All documents concerning the February 15, 2005 letter to Joseph Rutigliano from Anthony J. Cava "re: Farmingdale Multi-Model Transload Facility."
47. All documents and communications with landfills with respect to commodities shipped to or from the Facility.
48. All documents concerning the suitability of locations on Long Island for transloading facilities or transfer stations.
49. All documents concerning insurance for the Facility.
50. All documents concerning claims for personal injury or property damage where the injury or damage was alleged to have occurred at the Facility.

51. All documents concerning disputes with customers of Coastal or NYAR arising from or relating to the use or operation of the Facility, including but not limited to claims asserted by customers against Coastal or NYAR.

52. All documents concerning the collection from customers of the Facility of past due bills.

Dated: New York, New York
July 2, 2007

BOND SCHOENECK & KING, PLLC

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(516) 267-6300
Attorneys for the Town of Babylon

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-and-

DUANE MORRIS LLP

By: *Fran M. Jacobs*
Fran M. Jacobs

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(212) 692-1000

Attorneys for Pinelawn Cemetery Corporation

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35057

**NOTICE OF DEPOSITIONS OF NEW YORK
AND ATLANTIC RAILWAY COMPANY AND COASTAL DISTRIBUTION LLC
BY PETITIONERS THE TOWN OF BABYLON AND PINELAWN CEMETERY**

Pursuant to 49 C.F.R. § 1114.22, the Town of Babylon and Pinelawn Cemetery Corporation (together referred to as "Petitioners") hereby request that New York and Atlantic Railway Company ("NYAR") and Coastal Distribution LLC ("Coastal") produce for deposition the following persons on the dates and times set forth below. The testimony of such persons is needed to obtain information relevant and necessary in this proceeding, and not otherwise available to Petitioners, concerning, among other things, the true nature of the relationship between NYAR and Coastal, the extent of NYAR's involvement in Coastal's operation of the facility located on the property located in Farmingdale, New York, and the conditions at the facility located in Farmingdale New York. The depositions will take place under oath before a qualified notary public at the offices of Bond Schoeneck & King, PLLC, 1399 Franklin Avenue, Garden City, NY.

You are invited to attend and cross-examine.

Name of Witness

Date and Time

Fred Krebs

September 18, 2007 at 10:00 A.M.

Martin Sternberg

September 20, 2007 at 10:00 A.M.

Joseph Rutigliano

September 24, 2007 at 10:00 A.M.

**Dated: New York, New York
August 3, 2007**

EXHIBIT

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Howard M. Miller

1399 Franklin Avenue
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-and-

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By: Fran M. Jacobs
Fran M. Jacobs

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New York, NY 10036-4086
(212) 692-1000

Attorneys for Pinelawn Cemetery Corporation

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Depositions was served on August 3, 2007 by U.S. mail, postage prepaid, first class or equivalent, on the following parties and their counsel:

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Attorneys for New York and Atlantic Railway Company

JOHN F. McHUGH, ESQ.
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Attorney for Coastal Distribution LLC



Brian M. Jacobs

Duane Morris

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August 3, 2007

VIA FACSIMILE AND REGULAR MAIL

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Ronald A. Lane, Esq.
Fletcher & Sippel, LLC
29 North Wacker Drive, Suite 920
Chicago, IL 60608-2875

Re: Petition of The Town of Babylon and Pinelawn Cemetery (FD 35057)

Counselors:

I am writing on behalf of both Pinelawn Cemetery ("Pinelawn") and the Town of Babylon (the "Town") in order to determine whether it will be necessary to ask the Surface Transportation Board (the "STB") to compel New York and Atlantic Railway Co. ("NYAR") and Coastal Distribution LLC ("Coastal") to comply with our discovery requests.

It appears from the response filed by NYAR and Coastal that you are flatly refusing to comply with any of our discovery requests. Under 49 CFR § 1114.21(a)(1), a party to a proceeding before the STB may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding" or which "appears reasonably calculated to lead to the discovery of admissible evidence." As long as the information sought "may be relevant to matters in dispute," the information should be provided. Illinois Railnet, Inc., STB Finance Doc. 34549, at 2, 2005 STB LEXIS 171, at ** 3-4 (April 14, 2005). Moreover, 49 CFR § 1114.21(a)(2) provides that "[i]t is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Neither of the two reasons you give for refusing to comply with our discovery requests is valid or justifies your refusal to provide documents that are plainly discoverable under the standard set forth in 49 CFR § 1114.21(a). The first of these reasons—that no discovery was sought in the district court—would be, even if true, beside the point. The fact of the matter is that, under the Fed. R. Civ. P. 26(f), the parties are to work out a discovery schedule in connection with a Rule 16(b) conference. Because the district court action began with an

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1540 BROADWAY NEW YORK, NY 10036-4016

PHONE: 212.692.1000

EXHIBIT

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John F. McHugh, Esq.
Ronald A. Lane, Esq.
August 3, 2007
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application for a preliminary injunction, no such conference took place and nothing occurred in the case except the preliminary injunction application.

As for the other reason you give for refusing to comply with our document request -- that the focus of the request is on the economic terms of the arrangement between NYAR and Coastal, which you assert is irrelevant -- it is factually and legally inaccurate. Among other things, we requested documents concerning the safety of the Farmingdale Facility, the true nature of the relationship between NYAR and Coastal, and the types of materials handled at the Farmingdale Facility. Clearly, such materials may be relevant and, just as clearly, may lead to the discovery of admissible evidence. We are entitled to information showing who actually operates the Farmingdale Facility and is responsible for it. As the STB held in Tri-State Brick and Stone of New York, Inc., STB Finance Doc. 34824, at 4, 2006 STB LEXIS 463, at * 11-12 (Aug. 9, 2006) -- a case in which, as you know, the STB held that the operator of a transload facility was not entitled to federal preemption:

Tri-State Transportation is the only party that operates the transloading facility and is responsible for it. Further, there is no evidence that CP or NY&A has ever quoted rates or charged compensation for Tri-State Transportation's transloading service, or held out that service as part of the line haul rail transportation offered by either railroad. CP's and now NY&A's level of involvement with Tri-State Transportation's transloading operation is insufficient to make Tri-State Transportation's activities an integral part of NY&A's rail service (or CP's before it). Petitioners are merely using property owned by the City and occupied by Tri-State Transportation, under an expired agreement with CP, to transload cargo.

(Emphasis added.)

Like Coastal, Tri-State Brick and Stone paid the railroad a fee for the right to use the railyard for its transloading operation and, like Coastal, Tri-State Brick and Stone had an obligation to meet certain minimum shipping volumes. The STB, however, found that Tri-State Brick and Stone was "merely using the City's property to transload cargo. They are simply rail customers" and there is nothing that "would justify treating them differently from any other non-rail carrier lessor or occupant of rail property, or anyone that desires rail service, for that matter." Id., STB Finance Doc. 3484, at 6, 2006 STB LEXIS 563 at 15-16.

In short, both Tri-State Brick and Stone and Hi Tech Trans, LLC, STB Finance Doc. No. 34192, at *6, 2003 STB LEXIS 475, at *14 (Aug. 14, 2003), establish that a non-rail carrier

Duane Morris

John F. McHugh, Esq.
Ronald A. Lane, Esq.
August 3, 2007
Page 3

operating a transload facility is not subject to the STB's exclusive jurisdiction where it is operating the facility for its own benefit. You have not offered any evidence showing that the Farmingdale Facility is being operated under the auspices of NYAR. We are entitled to evidence concerning the operation of the Farmingdale Facility.

Please let us know by the close of business on August 7, 2007 whether we will have to ask the STB to direct NYAR and Coastal to comply with our discovery requests. Enclosed herein are notices to depose both NYAR and Coastal. We will conduct the depositions once the documents we seek have been produced.

Very truly yours,



Fran M. Jacobs

Enclosure

cc: Howard Miller, Esq. (by facsimile and w/encl.)
Mark Cuthbertson, Esq. (by facsimile and w/encl.)